No. 83-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURPHY OIL CORPORATION,

Petitioner,

V.

NAPH-SOL REFINING COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENT NAPH-SOL REFINING COMPANY

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May 14, 1984

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QUESTIONS PRESENTED

This case invlolves a technical procedural challenge to a rule which was issued nearly ten years ago and was rescinded more than three years ago. The petition for a writ of certiorari presents the following questions for decision:

1. Whether the court below properly declined, eight years after the fact, to set aside the Federal Energy Administration's decision, made in September 1974 during the early period of petroleum price controls, that good cause existed to issue a rule without prior notice and opportunity for comment where the rulemaking record, including contemporaneous agency statements, reflects the agency's findings:

a. that changes in market conditions in mid-1974 had revealed an unintended loophole in the existing price control regulations which permitted a number of refiners to begin discriminating against certain customers (*e.g.*, independent gasoline marketers) by selectively increasing their prices while favoring other customers (*e.g.*, refiner-operated gasoline stations);

b. that such price discrimination was directly contrary to central policies underlying the price control regulations and, if unrestrained, carried the potential for substantial economic harm; and

c. that advance notice of rulemaking to close this loophole would have (i) stimulated additional price discrimination by publicizing the availability of the loophole and (ii) permitted refiners to "grandfather in" such price discrimination by entering into long-term contracts with favored customers prior to the effective date of the regulation.

2. Whether the court below correctly rejected petitioner's formalistic challenge to the statement of basis and purpose which accompanied the agency's repromulgation of the rule involved in this case in December 1974, where review of the record convinced the court that the agency's path could reasonably be discerned.*

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*Pursuant to Rule 28.1 of the Rules of this Court, respondent represents that it has no parent companies, subsidiaries (other than wholly-owned subsidiaries), or affiliates.

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STATEMENT OF THE CASE

The decision of the Temporary Emergency Court of Appeals ("TECA") in this case upheld as procedurally valid a regulation which was first issued in September 1974, nearly ten years ago, as part of the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 210 through 212. That regulation, the so-called "deemed recovery rule," was rescinded along with the remainder of petroleum price controls in January 1981, more than three years ago. *See* Executive Order No. 12287, 46 *Fed. Reg.* 9909 (January 30, 1981).

The statement of the case presented in Murphy Oil Corporation's ("Murphy's") petition for certiorari accurately summarizes the procedural history of this litigation. It fails, however, to convey the

regulatory significance of the deemed recovery rule or to place Murphy's challenge to that regulation in context. Accordingly, Naph-Sol Refining Company ("Naph-Sol") provides the following supplemental statement of the case.

A. The Deemed Recovery Rule

The Mandatory Petroleum Price Regulations ("Price Regulations") established limitations on the maximum price which could be charged in any sale of a covered product. With respect to refined petroleum products such as gasoline, the maximum price which a refiner could charge for a particular product was determined by adding (a) the weighted average price at which the product was sold in transactions with the class of purchaser involved on May 15, 1973; (b) the allowable increased crude oil and other costs incurred by the refiner in the month immediately preceding the sale concerned; and (c) the amount of increased costs which the refiner had "banked" from previous months and which were now available for pass-through. *See* 10 C.F.R. §§ 212.82, 212.83(a), 212.83(e) (1981). *See generally Longview Refining Co. v. Shore*, 554 F.2d 1006, 1017 (Temp. Emer. Ct. App.), *cert. denied*, 434 U.S. 836 (1977); *Naph-Sol Refining Co. v. Cities Service Oil Co.*, 495 F. Supp. 882, 889-90, 898 (W.D. Mich. 1980). In fundamental structure, this formula remained constant during the entire period of price controls.

The foundation of the refiner price rule was the class of purchaser concept. The requirement that prices be keyed to classes of purchaser was adopted "to preserve the price distinctions that customarily existed under free market conditions" and to "maintain the price differentials that existed on May 15, 1973 between groups of purchasers which were not similarly situated then and are not now similarly situated." FEA Ruling 1975-2, 40 *Fed. Reg.* 10655, 10656 (March 7, 1975). *See Naph-Sol Refining Co. v. Cities Service Oil Co., supra*, 495 F. Supp. at 889.[1]

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[1]Maintaining customary pricing distinctions among customers was a central feature of petroleum price controls beginning with the Phase IV economic stabilization regulations of the Cost of Living Council ("COLC"). As the

(Footnote Continued)

If refiners had been allowed complete discretion in allocating increased costs among their various customers, the customary price differentials reflected in the May 15, 1973 prices would quickly have been subverted. Accordingly, from the outset, the price regulations also provided that increased costs had to be applied in uniform increments to all of the refiner's classes of purchaser of a particular product when the refiner calculated its maximum lawful prices. This requirement became known as the equal application rule.

The regulations did not require a refiner to allocate all of its increased costs which were eligible for pass-through in a given month; rather, it could choose to "bank" some or all of its costs. Similarly, the regulations did not require that a refiner actually charge the maximum lawful prices calculated under the refiner price rule; it was free to charge *lower* prices. In late 1973 and early 1974, when crude oil supplies were critically short, these elements of the regulations were unimportant, as a practical matter, since refiners were charging the highest prices permitted by the regulations.

In mid-1974, however, when supplies improved, the Federal Energy Administration ("FEA") learned that a number of refiners were engag-

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(Footnote Continued)
official history of the regulatory program, written in 1974 by the former COLC staff, indicates:

> *It was possible under the Phase III system to double prices* for some products in some areas and *to some customers without corresponding increases to other consumers* in their areas. The only requirement was that a firm's overall price increase met the firm-wide tests under Phase III. *Phase IV rules changed all that by outlawing such price discrimination.*

Office of Economic Stabilization, U.S. Department of the Treasury, "History of Petroleum Controls," *Historical Working Papers of the Economic Stabilization Program, Part II* (Washington, D.C.: Government Printing Office), pp. 1262-63. Indeed, protection of independent gasoline marketers such as Naph-Sol from price and supply discrimination by refiners who might favor their own branded gasoline stations was a principal congressional objective in adopting the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et. seq. McWhirter Distributing Co., Inc. v. Texaco, Inc.*, 668 F.2d 511, 523 n.18 (Temp. Emer. Ct. App. 1981).

ing in discriminatory pricing by cutting prices to preferred customers and banking the unrecovered increased costs assigned to those customers, while charging its other customers the highest prices allowed by the price regulations. If permitted to continue, such pricing would have led to the complete disintegration of the class of purchaser principles underlying the Price Regulations.[2] Accordingly, in an August 30,1974 emergency rulemaking, FEA promulgated the deemed recovery rule to make clear that such discriminatory pricing practices were impermissable. 39 *Fed. Reg.* 32306 (September 5, 1974).

The opinion below explained the operation of the deemed recovery rule in the following terms:

> Under the deemed recovery rule, then, the refiner had to pass through increased product costs uniformly among all classes of purchaser or suffer a cost recovery penalty. Specifically, each month the refiner was required to compute its bank of unrecovered costs as though it had charged all classes of purchaser the largest increment of increased costs it charged to any one class of purchaser, even though, in fact, it did not. If a refiner applied increased costs unequally, thus, it had to reduce its bank of previously unrecouped costs by an amount that was larger than the amount of increased costs actually recouped. The refiner, that is, was "deemed" to have recovered costs it, in fact, did not. By penalizing selective price increases, therefore, the deemed recovery rule provided an economic incentive for equal pass through of increased product costs in actual selling prices.

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[2]Such pricing in turn would have undermined the mandatory petroleum allocation program, 10 C.F.R. Part 211, as well. Since all supplies were spoken for under the allocation program, customers unwilling to purchase excessively priced product from their assigned refiners would have had nowhere else to turn; their assigned allocations would thus have become meaningless.

Mobil Oil Corporation, et. al. v. Department of Energy, et al., Nos. 2-40, 6-31 (Temp. Emer. Ct. App. December 20, 1983), slip op. at 10-11.[3]

The deemed recovery rule was thus essential to preservation of a central tenet of the Price Regulations, *viz.*, maintenance of customary price differentials. In the absence of such a rule, a refiner would have been able selectively to apply increased costs to some customers and bank increased costs as to other, more favored customers. As the refiner repeated this practice over time, any semblance of customary pricing differentials—and, indeed, the class of purchaser concept itself—would have vanished.[4] The deemed recovery rule was thus central to the very scheme of petroleum price controls.

B. Murphy's Challenge to the Deemed Recovery Rule

Several aspects of Murphy's challenge to the deemed recovery rule must be borne in mind in evaluating the decision below. First, the deemed recovery rule was issued during the early period of petroleum price controls. TECA, the congressionally designated court of expertise in this area, has repeatedly recognized the "gargantuan

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[3]Pet. App. at 10a. The opinion of the court below is reproduced as Appendix A to Murphy's petition for certiorari. Reference in this brief to the petition for certiorari will be made in the form "Pet. at _____." References to the appendices to the petition will be made as "Pet App. at _____."

[4]This effect can be illustrated by a simple example. Suppose a refiner had only two customers, one a company-operated gasoline station and the other an independent, unbranded gasoline marketer. In May 1973, the price differential between these two customers was one cent per gallon. Assume also, for the sake of simplicity, that the refiner sold 5000 gallons each month to each customer (*i.e.*, 10,000 gallons in total) and that the refiner's increased costs eligible for pass-through each month were $1,000 (*i.e.*, 10 cents per gallon sold.) If the refiner were each month to pass through increased costs only to the independent station and "bank" the increased costs attributable to its own station, at the end of only 6 months' time the one cent per gallon differential between the two customers' prices would have grown to more than twenty cents per gallon, a result which is plainly inconsistent with the policy of preserving customary price differentials.

task" facing the agency during that period.[5] For that reason, in decisions which this Court has repeatedly declined to review, TECA has correspondingly afforded the agency "reasonable leeway" with respect to the procedures it followed in reacting to the rapid and complex changes in economic conditions faced by the country in 1973 and 1974.[6]

Second, Murphy's challenge to the deemed recovery rule was not raised until more than seven years after the rule's issuance, indeed fourteen months after termination of price controls.[7] Thus, the court below observed that in considering the adequacy of the agency's good cause finding, "it is essential to recognize that we are being called upon, some eight years after the fact, to review agency determinations that were, in large measure, of a judgmental or predictive nature." Pet. App. at 29a. Similarly, with respect to Murphy's challenge to the agency's statement of basis and purpose, TECA stated that "we are disinclined, some eight years after the event, to invalidate a rule on the technical ground of a deficient statement of basis and purpose when we can fairly discern the agency's aims." Pet. App. at 38a.

Third, this is not a case where a company has complained that an unfair or new interpretation of a regulation is now being applied against it for the first time. In fact, the deemed recovery rule was both simple and clear; neither Murphy nor any other company has made a contrary claim. Rather, Murphy has presented a *facial procedural challenge* to the rule, alleging "defects" which should have been obvious on the face of the regulations—*i.e.*, an insufficient basis

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[5]*See, e.g., Pasco, Inc. v. FEA*, 525 F.2d 1391, 1394 (Temp. Emer. Ct. App. 1975), which involved a challenge to a rulemaking begun two days before the deemed recovery rule was issued.

[6]*See, e.g., National Helium Corp. v. FEA*, 569 F.2d 1137, 1144 (Temp. Emer. Ct. App. 1977); *California v. Simon*, 504 F.2d 430, 439 *(Temp. Emer. Ct. App.), cert. denied*, 419 U.S. 1021 (1974). TECA early refused to apply a doctrine of "technical absolutism" in weighing compliance with rulemaking procedures. *Id.*

[7]Because of Murphy's unreasonable delay in challenging the deemed recovery rule, Naph-Sol urged the court below to find that laches barred Murphy's arguments. Although strongly troubled by the argument, Pet. App. at 18a-22a, TECA declined to so hold on the theory that "laches does not run against a defense." Pet. App. at 22a-23a.

for waiving notice and public comment and an inadequate statement of basis and purpose.

Nor does Murphy's challenge involve a claim that the industry in general, or Murphy in particular, was deprived of an opportunity to comment on the deemed recovery rule or that the industry did not in fact understand the basis and purpose of the rule. Although the deemed recovery rule was initially adopted without notice and opportunity for comment, its promulgation was followed within five days' time by a rulemaking proceeding in which public comment on the deemed recovery rule was specifically invited. 39 *Fed. Reg.* 32718 (September 10, 1974). As the court below observed, the industry, including Murphy, took advantage of that invitation. Pet. App. at 31a and 35a.[8] Moreover, the agency repromulgated and gradually liberalized the deemed recovery rule with respect to gasoline, following notice and comment procedures, on no less than ten additional occasions between December 1974 and November 1980, when sales of gasoline were exempted from the rule.[9] In short, the dialogue between the agency and the industry concerning the deemed recovery rule was substantial and continuing.

Against this backdrop, it is clear that Murphy's procedural challenge to the deemed recovery rule is purely technical, involving no legitimate claim of unfairness or prejudice, and has been raised eight years after the fact solely to avoid the consequences of Murphy's failure to comply with a rule which it well understood.[10]

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[8]In the court below, Murphy also argued that the rulemaking which immediately followed the September 5, 1974 initial promulgation of the deemed recovery rule was inadequate to *repromulgate* the rule since it did not contain a legally sufficient invitation of comment on the deemed recovery rule. TECA rejected this contention. Pet. App. at 33a-36a. In its petition, Murphy has apparently abandoned this argument, focusing instead on its contention that repromulgation of the deemed recovery rule was not accompanied by an adequate statement of basis and purpose. Pet. at 22-24.

[9]*See* 40 *Fed. Reg.* 10444 (March 6, 1975); 41 *Fed. Reg.* 5111 (February 4, 1976); 41 *Fed. Reg.* 15330 (April 12, 1976); 41 *Fed. Reg.* 30021 (July 21, 1976); 42 *Fed. Reg.* 2288 (May 5, 1977); 44 *Fed. Reg.* 45352 (August 1, 1979); 45 *Fed. Reg.* 28302 (April 29, 1980); 45 *Fed. Reg.* 40104 (June 13, 1980); 45 *Fed. Reg.* 41902 (June 23, 1980); 45 *Fed. Reg.* 72626 (November 3, 1980).

SUMMARY OF ARGUMENT

Conceding that construction of long defunct petroleum price regulations does not present any issues of sufficient importance for this Court's review, Murphy seeks instead to find grounds for review in TECA's alleged misapplication of fundamental principles of administrative law. Murphy's efforts to find conflict between the decision below and prior decisions of this Court and other courts of appeals, however, are unsuccessful.

As to its challenge to TECA's approval of the agency's decision to waive notice and comment when it first promulgated the deemed recovery rule, Murphy asserts that TECA improperly considered matters beyond the rulemaking record, applied a new, improperly broad legal standard for "good cause," and announced a rule of abdication of judicial review of such agency decisions. On all three points, Murphy is wrong. In upholding the agency's waiver decision, TECA considered the reasons which accompanied the rule's issuance as well as contemporaneous statements of the agency, including a Federal Register notice which followed announcement of the deemed recovery rule by five days and which was specifically referred to in the announcement of the rule. In so doing, TECA acted in a manner fully consistent with numerous decisions of other courts of appeals. Moreover, the "new" legal standard applied by the court below was

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[10]Although not relevant to the legal issues before this Court, Naph-Sol vigorously disputes Murphy's contention that Naph-Sol was overcharged under the deemed recovery rule only because Murphy "occasionally," "accidentally" charged other customers a higher increased cost increment than it charged Naph-Sol. Pet. at 7 and n.7. First, upon trial of this case, Naph-Sol expects to prove that Murphy's breaches of the deemed recovery rule were neither infrequent nor accidental. Indeed, the overcharges in this case attributable solely to Murphy's violations of the deemed recovery rule exceed $1 million. Second, while Murphy is correct in asserting that the increased cost increments assigned to Naph-Sol's class of purchaser were

(Footnote Continued)

in fact an established standard that had been applied in numerous prior TECA decisions, dating back to 1974, which this Court consistently declined to review. Finally, TECA did not "abdicate" judicial review of the agency's decision in this case. Rather, it identified the reasons offered by the agency, recognized that they involved predictive judgments to which the courts have uniformly given greater than usual deference, and declined to apply "20-20 hindsight" to second-guess the agency eight years after the fact. In short, TECA applied accepted principles of judicial review in upholding the agency's action in the unique circumstances of this case. Murphy has presented no cogent reason for the Court to review this aspect of the opinion below.

As to Murphy's challenge to the statement of basis and purpose which accompanied repromulgation of the deemed recovery rule in December 1974, Murphy asserts that TECA's opinion is contrary to this Court's ruling in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983). Again, Murphy is wrong. The court below carefully reviewed the administrative record and concluded that, although the explanation offered by the agency was cursory, it could reasonably discern the basis for the agency's action. In so holding, TECA applied the established rule, expressly reaffirmed in the *Motor Vehicle Manufacturers'* case, that a decision of less than ideal clarity must be upheld "if the agency's path may reasonably be discerned." Moreover, TECA concluded that application of this rule was particularly warranted where, as here, the challenge was not raised until eight years after the fact and was purely technical in nature. In this aspect as well, TECA acted responsibly and in accordance with the decisions of this Court and others. No reason exists for reviewing this alternative ground for TECA's decision.

(Footnote Continued)
not the highest assigned to any class of purchaser, they were higher than the cost increments passed on by Murphy to many other customers. Put differently, Naph-Sol was discriminated against by Murphy, although not by as great a margin as some of Murphy's other customers. Murphy systematically practiced price discrimination, the very practice that the deemed recovery rule was designed to restrain. Murphy's protestations that it is the innocent victim of an irrational rule are hollow.

ARGUMENT

Recognizing that TECA's construction of long-since rescinded petroleum price control regulations presents no issues of sufficient importance to warrant this Court's review, Murphy has instead sought to characterize the opinion below as having decided fundamentally important issues of administrative law in a fashion which conflicts with decisions of other courts of appeals and with this Court's decision in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983). Specifically, Murphy challenges TECA's approval of the agency's decision to waive notice and comment when it first issued the deemed recovery rule in September 1974 and of the statement of basis and purpose which accompanied repromulgation of the rule in December 1974. By so ruling, Murphy asserts, TECA has provided an "all purpose escape clause" and a "road map" for all agencies to succomb to the "ever-present temptation" to issue regulations without public participation and without explanation of the basis for their actions. Pet. at 13-14, 18, 20, 22, 24, 25.

In fact, the decision below amounts to none of these things. In upholding promulgation of the deemed recovery rule, TECA applied "garden variety" principles of administrative law in a manner fully consistent with the opinions of this Court, its own prior decisions, and the holdings of other courts of appeals. In so ruling, TECA was cognizant that the rulemakings involved were not paragons of rulemaking procedure; for that reason, it went out of its way to emphasize that it was upholding the regulations only in the unique setting of this case. Pet. App. at 29a. 38a. Under these circumstances, neither consistency with other holdings, importance of the issues, nor precedential significance argue in favor of this Court's review of the decision below. The petition for certiorari should be denied.

1. TECA's Review of the Decision to Waive Notice and Public Comment Was Proper

In upholding the agency's decision that "good cause" existed to promulgate the deemed recovery rule without prior notice and opportunity for comment, TECA canvassed in some detail the reasons proferred by the agency:

> The preamble to the deemed recovery rule explained that the amendment was intended to clarify an "ambiguity" in the Regulations by putting
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> > all sellers. . .expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a preexisting contract prevents the implementation of such a price.
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> 39 Fed. Reg. 32306, 32307 (Sept. 5, 1974). Although "most sellers" had been equally applying costs in prices below base prices,
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> > (a)s an improved supply situation has begun to have a restraining influence on prices, the FEA has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price.
>
> *Id.* Such practices "could obviously serve to avoid the intent of the overall framework of the price regulations," particularly the goal of preserving the "customary price differentials" among classes of purchaser. *See id.* The deemed recovery rule was designed to prevent this.

Pet. App. at 26a.

TECA then observed that the agency had waived notice and comment out of conern that advance notice would, by broadcasting the ambiguity in the regulations, stimulate further price discrimation and enable refiners to take advantage of the contract exception to "grandfather in" unequal cost pass-throughs to refiner-operated stations by entering into long-term contracts before the effective date of the regulations:

The FEA promulgated the rule without prior notice and comment, finding that an emergency existed and explaining that:

> [A]s the supply situation becomes more favorable, the incentive to depart from the equal application requirement becomes stronger. Moreover, announcement of these amendments as proposals would highlight current ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulation.
>
> The FEA has determined that the continuation or initiation of such practices would be injurious to the public welfare, in view of the number of circumventions of FEA regulations and the substantial compliance difficulties which would result.

Pet. App. at 26a-27a.[11]

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[11]With respect to Murphy's complaint that the September 5, 1974 notice did not identify the objects of the price discrimination which the deemed recovery rule was intended to prevent, TECA held:

> The September 5, preamble, it is true, did not specifically mention independents and regions of the country. The preamble, however, stated that a notice of hearings on proposed revisions of the Regulations would appear "in the near future," *id.*, which turned out to be September 10, 1974. The September 10 notice did explicitly indicate that the deemed recovery rule served to protect independents, and regions, from selective pricing. See 39 Fed. Reg. 32718, 32722-23 (Sept. 10, 1974).

Pet. App. at 32a.

After noting that it had held on a number of prior occasions that good cause to waive notice and comment can exist when "the very announcement of a proposed rule itself" can be expected to precipitate the harm the rule is designed to prevent, Pet. App. at 28a, the court concluded:

> Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the FEA's judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable.

Pet. App. at 30a. Accordingly, the court upheld the September 5, 1974 promulgation of the deemed recovery rule.

Murphy claims in its petition that TECA's analysis suffers from three flaws warranting this Court's review. First, Murphy argues that TECA should have limited its review of the agency's decision to waive notice and comment to the confines of the September 5, 1974 preamble and that it erred in even considering the Federal Register notice which followed on September 10, 1974. TECA, however, specifically found that the September 10, 1974 notice was a contemporaneous statement of the agency's views, Pet. App. at 32a, a finding underscored by the fact that the September 10 notice was specifically referred to in the September 5 notice. TECA's consideration of contemporaneous agency statements was fully consistent with numerous decisions of other courts of appeals. *See, e.g., Alabama Assn. of Insurance Agents v. Board of Governors*, 533 F.2d 224, 236-37 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978):

> [A] court must not only examine whether an agency's promulgation of a challenged regulation complies with the procedural requirement; it must also determine whether, in light of the nature and content of the regulation and of the

> underlying legislation, *the extraneous material which may be available to explain the basis and purpose of the agency action*, and the quantum of action taken in reliance on the regulation, any procedural flaw so subverts the process of judicial review that invalidation of the regulation is warranted.

(Citations omitted; emphasis added.) *Accord Texaco, Inc. v. FEA*, 531 F.2d 1071, 1079 and n.15 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); *California Citizens Band Assn. v. United States*, 375 F.2d 43, 49 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967).[12]

Second, Murphy contends that TECA impermissibly broadened the scope of the "good cause" exception by holding that good cause may be found where advance notice of the rule will itself precipitate the harm to the public welfare which the rule is intended to prevent. Murphy has cited no decision of this Court or any other, however, which is in conflict with that holding, and TECA's ruling in this regard was fully and expressly grounded in prior decisions of that court. *See Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). *See also Reeves v. Simon*, 507 F.2d 455, 458-59 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975). Indeed, at least one commentator has characterized the situation in which advance notice will itself worsen the problem the agency is trying to combat as "the strongest case for the good cause exemption."[13]

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[12]Neither of the cases cited by Murphy, Pet. at 14, hold to the contrary. In *Buschmann v. Schweiker*, 676 F.2d 352, 356-57 (9th Cir. 1982), the challenged rulemaking was accompanied by *no* explanation of the agency's decision to make the regulation effective less than 30 days following publication, and the court declined to supply that explanation by reference to another Federal Register notice which had been published almost two years earlier and which did not even mention the subsequent rulemaking. Similarly, in *Kelly v. U.S. Department of the Interior*, 339 F. Supp. 1095, 1100-1101 (E.D. Cal. 1972), no statement of reasons accompanied the agency's decision to waive notice and comment; no question of contemporaneous statements was even involved.

[13]Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Ad. L. Rev. 113, 122 (1984). Murphy's assertion that "the court itself recognized that this ruling is a new departure," Pet. at 18, is utterly without

Finally, Murphy contends that TECA "largely did away with. . . the courts' obligation to review the justification" for waiver of notice and comment by announcing "a rule of '*extreme* deference' to agency predictions and 'forecasts' about what kind of injury could result from announcement of a proposed rule." This "abdicat[ion]" of judicial control, Murphy argues, will permit wholesale evasion of rulemaking procedures. Pet. at 22. In so arguing, however, Murphy has misconceived the nature of the holding below.

TECA's conclusion that agency determinations of a judgmental or predictive nature are entitled to greater deference than other determinations by an administrative agency is unassailably well-founded in the decisions of this and other courts cited in the opinion below. Pet. App. at 29a. In so stating, however, TECA did not abdicate review of such determinations. To the contrary, it held that in such circumstances a court must "satisfy itself that the agency explains the facts and policy concerns it relies on, and that, given these, a reasonable person could have made the judgment the agency did." Pet. App. at 30a (citations omitted). In this case, TECA concluded that the agency had met that test.

Moreover, affording deference to the agency's judgment is particularly appropriate in the unique circumstances of this case, as TECA emphasized in its opinion:

> [A]ppellees here urge that there is no showing that in fact independents would be injured during the notice and comment period. In considering this question it is essential to recognize that we are being called upon, some eight years after the fact, to review agency determinations that were, in large measure, of a judgmental or predictive nature.
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support in the court's opinion. Moreover, its prediction that this "broad new" rule will lead inevitably to agency abuse is demonstrably untrue since the rule, even if "new," was first announced by TECA in 1974 and has not resulted in any detectable opening of the floodgates in the intervening 10 years. Indeed, in the only cased cited by Murphy in which the Government apparently cited *Nader v. Sawhill* to justify an agency's failure to permit notice and comment before the effective date of regulations, Pet. at 25, the courts declined to uphold the agency's action.

> Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the FEA's judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable. It is easy, in retrospect, to state that FEA's fears were exaggerated. FEA, however, was in a better position in August 1974 to appreciate the economic dynamics of the oil industry at that time than the courts are today; we must avoid being hampered by 20/20 hindsight.

Pet. App. at 29a, 30a. Under the circumstances, TECA's opinion portends no dramatic contraction of judicial review of agency action and is fully in accord with well-established principles of administrative law.[14] No cogent reason for this Court's review has been presented.

2. The Court's Alternative Holding That The Deemed Recovery Rule Was Validly Repromulgated in December 1974 is Fully Consistent With This Court's Decision in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*

In addition to holding that the deemed recovery rule was properly promulgated on September 5, 1974, TECA also stated that it would have upheld the deemed recovery rule, even if the initial promulgation had been procedurally defective, on the ground that it was validly repromulgated on December 5, 1974, following notice and opportunity

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[14]Murphy's remaining arguments concerning, variously, the adequacy of existing law to curb price discrimination (Pet. at 20-21), the meaning of an internal agency memorandum (Pet. at 21-22), and other procedural alternatives available to the agency (Pet. at 18-19, 22) were fully addressed in the briefs and opinion below; no further response is necessary.

for comment, including public hearings. Pet. App. at 33a. Murphy challenges this alternative holding as well, claiming that TECA "simply ignored" this Court's decision in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co., supra.* Pet. at 23. Again, Murphy is wrong.

TECA's opinion candidly conceded that the December 5, 1974 repromulgation of the deemed recovery rule was accompanied by only a cursory explanation. Pet. App. at 37a. Nevertheless, by canvassing the September 5, 1974 and September 10, 1974 preambles and the explanation set forth in the December 5 notice, TECA concluded that the agency's reasons for retaining the rule were " reasonably clear: the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility." Pet. App. at 37a.[15]

In so ruling, the court below applied the well established and often employed principle that "even when the ' asis and purpose statement is cursory, or, indeed, nonexistent, a rule may be upheld when the agency's path may reasonably be discerned." Pet. App. at 37a.[16] Murphy's claim that this principle is "directly contrary to this Court's holding in *Motor Vehicle Manufacturers' Association*" (Pet. at 23) is belied by a simple reading of that opinion. In *Motor Vehicle Manufacturers' Assn.*, this Court reaffirmed its holding in *Bowman Trans-*

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[15]The agency advised the industry that it would continue to consider the issue of the necessity of the deemed recovery rule and would make modifications to the rule as and when appropriate. 39 *Fed. Reg.* 42368 (December 5, 1974). In this respect, the December 24, 1974 notice upon which Murphy so heavily relies (Pet. at 24) is fully consistent with TECA's conclusion that the agency had decided to retain the deemed recovery rule for the time being; all the December 24 notice did was renew the agency's earlier promise that it would continue to weigh the need for modification of the deemed recovery rule. The numerous subsequent modifications to the deemed recovery rule summarized in note 9, *supra*, confirm that the agency made good on its promise.

[16]*See, e.g., American Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct. Cl. 1979); *Alabama Assn. of Insurance Agents v. Board of Governors*, 533 F.2d 224, 237 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974); *Courtaulds (Alabama), Inc. v. Dixon*, 294 F.2d 899, 904 (D.C. Cir. 1961); *Hoving Corp. v. FTC*, 290 F.2d 803, 807 (2d Cir. 1961).

portation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 286 (1974), that the courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Company, supra*, 103 S. Ct. at 2867. The decision below thus applied a principle expressly recognized in *Motor Vehicle Manufacturers' Assn.*; doctrinally, therefore, the two decisions are consistent.

Moreover, in *Motor Vehicle Manufacturers' Assn.*, this Court struck down the National Highway Traffic Safety Administration's decision to rescind a motor vehicle passive restraint standard because the agency's articulated reason for suspending the standard simply did not support its decision. In short, the Court was unable to discern the agency's path. By contrast, the court below was able to discern the agency's path and, therefore, properly upheld the December 5, 1974 repromulgation of the deemed recovery rule.

The decision below was thus fully consistent with both the holding and the reasoning of the *Motor Vehicle Manufacturers' Assn.* decision. In fact, the only sense in which the two decisions can be said to conflict is that this Court invalidated the agency decision involved in *Motor Vehicle Manufacturers' Assn.* while TECA upheld the agency decision in this case. Such a "conflict" hardly provides any basis for this Court's review. Accordingly, on this ground as well, Murphy's petition is without merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 14, 1984

Respectfully submitted,

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